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September 14, 2011

Peter Taylor, Esq.
Federal Election Commission
Office of the General Counsel
999 E Street N.W.
Washington, D.C. 20463

RE: MUR 6413
Taxpayer Network
Response to RTB Finding

Dear Mr. Taylor:

Enclosed, please find the response of Respondent Taxpayer Network for the above referenced matter. Should you have questions, please contact me.

Thank you for your time and attention to this matter.

Very truly yours,

Paul E. Sullivan

PES/pas

Encl.

cc: Chair, Commissioner Bauerly
Vice-Chair, Commissioner Hunter
Commissioner McGahn
Commissioner Petersen
Commissioner Walther
Commissioner Weintraub

BEFORE THE FEDERAL ELECTION COMMISSION

In Re	)	
	)	
Taxpayer Network, Inc.	)	MUR 6413
	)	Response to RTB Findings
	)	

In accordance with 2 U.S.C. § 437g (a)(3) Taxpayer Network, Inc., (Respondent) through its undersigned legal counsel, submits this response to the Commission in the above referenced matter. For the reasons set out below, Respondent requests the Commission make a finding of no probable cause and close the file.

I. Response to RTB Factual and Legal Analysis

a. *Response to FLA Factual Background*

The Factual Background, as set forth in the Reason To Believe (RTB) Factual and Legal Analysis (FLA), states that the October 27, 2010 Complaint (Complaint) alleges that one week prior to the 2010 general election, Respondent aired two television grassroots lobbying advertisements in California which contained a photo of Senator Boxer, (Ads) who was at the time, a candidate in the November 2010 California general election.

On the basis of those facts and upon the further FLA presumption that the Respondent expended in excess of $10,000 for the production and airing of the Ads, the Complaint alleges the Respondent violated 2 U.S.C. § 434(f) for failure to file disclosure reports related to the Ads and 2 U.S.C. § 441d for failure to include a complete disclaimer notice in the Ads as required by the Federal Election Campaign Act of 1971, as amended (FECA or Act).

Simply put, at issue are two television advertisements, paid for by Respondent which pertain exclusively to the legislative voting record of Senator Barbra Boxer of California. The Ads neither referenced the general election nor the election or defeat of Senator Boxer or her opponent. Rather, the Ads were a classic legislative grassroots lobbying communication which referenced several legislative votes of Sen. Boxer and advocated the listener to contact Sen. Boxer at the phone number listed on the screen to urge her to support funding for military veterans. The last seven (7) seconds of each of the Ads contained the disclaimer "Paid for by Taxpayers Network" in a font size greater than 4% of the screen.

With respect to the content of the Ads, the FLA states that both advertisements, "...are very similar, sharply criticize Boxer's voting record, but *do not make any clear reference to, or expressly advocate her defeat in, the upcoming election*" (FLA p. 2; emphasis added). Respondent agrees with this assessment of the FLA finding that neither of the Ads expressly advocated Senator Boxer's election or defeat and that the Ads merely criticize the voting record of Senator Boxer.

b. *Response to FLA Legal Analysis*

The Legal Analysis correctly states that the Supreme Court's opinion in *Citizens United v Federal Election Commission*, 558 U.S._____, 130 S. Ct. 876 (2010) (*Citizens)* struck down as unconstitutional the provision of the FECA prohibiting corporate financing of electioneering communications at 2 U.S.C. § 441b (b)(2) (*Citizens* 913). Therefore, no allegation is presented in the FLA regarding the any impermissible use of Respondent's corporate treasury funds to pay for the Ads and Respondent agrees with that FLA analysis. (FLA p. 3).

However, the FLA contends that the *Citizens* opinion upheld the Act's E/C disclosure and disclaimer provisions set forth at 2 U.S.C. §§ 434(f)(1) and 441d. *id.*(citing to *Citizens* at 915-916). Based upon that contention, the FLA concluded that the E/C disclosure provisions at § 434(f)(1) and disclaimer provision at § 441d were applicable to the Ads and therefore, Respondent violated § 434(f) by failing to file the disclosure reports and § 441d as related to the Ads.

Respondent disagrees that *Citizens* is the controlling E/C authority as applied to this MUR. As will be detailed below, the Court's opinion in *Citizens* was based upon a fact pattern in the evidentiary record in which the Court found that the content of the communication at issue (the *Hillary* video) contained an express advocacy communication and it was on that basis that the disclosure and disclaimer provisions were upheld by the Court. The fact pattern in this MUR is materially distinguishable from *Citizens* since the Ads do not contain an express advocacy message as acknowledged in the FLA.

Two other points need to be noted regarding the FLA. The Commission made a finding of RTB that Respondent failed to include a complete disclaimer notice; FLA acknowledges Respondent included "Paid for by Taxpayer Network" which is one portion of the required § 441d notices.

Secondly, the FLA cites to MUR 5889 (Republicans for Trauner) as authority to compel Respondent to comply with the disclaimer obligations in this E/C matter. Respondent disagrees with the proffered relevance of this authority. MUR 5889 dealt with an independent expenditure issue, which by its very definition (2 U.S.C. § 431(17) pertains to an express advocacy communication. Such is not the case in this matter. The lack of an express advocacy communication in this MUR's fact pattern constitutes a material basis for distinguishing it from MUR 5889 and is therefore not applicable to the current matter.

There are no MUR's on point of which Respondent is aware that address the issue as presented in this current matter.

c. Summary of Respondent's argument

Respondent will argue below that, as applied to this matter, since the Ads are acknowledged in the FLA not to constitute express advocacy or its functional equivalent,[1] then at that point in the analytical process, the Commission ceases to have jurisdiction over the regulation of the Ads. The failure to meet the jurisdictional burden precludes the Commission from mandating or enforcing the disclosure/disclaimer provisions of the FECA. The FLA fails to proffer any authorities in which the disclosure/disclaimer provisions of the Act were upheld by the Court in a fact pattern in which the content of the communication did not constitute express advocacy. *Buckley, McConnell* and *Citizens* each upheld the disclosure and disclaimer provisions based upon an evidentiary record that pertained to an express advocacy communication.

This case does NOT involve the solicitation of funds for any type of political entity or the advocacy for the election or defeat of any candidate, including Sen. Boxer or her opponent. Therefore, the only basis upon which the Commission is able to argue jurisdiction over Respondent for enforcement of the alleged disclaimer/disclosure mandates, is based solely upon the content of the Ads.

Respondent cites to several recent authorities which indicate a strict scrutiny standard applies to the disclosure/disclaimer provisions. Regardless of the applicable level of the states interest, the FLA fails to cite to <u>any</u> government interest to substantiate its regulation of Respondents political speech, to include the associated disclosure/disclaimer mandates. As such the FLA clearly fails to present a sufficient state interest which could possibly meet that strict scrutiny constitutional burden to mandate Respondent to file the disclosure reports or include the FECA disclaimer notice.

II. <u>The current standard for FECA jurisdiction to regulate public FECA related communications has been firmly established as one which must meet an express advocacy or its functional equivalent threshold.</u>

At issue in this matter is the narrow question of whether an entity, which pays for a television communication, the content of which meets the criteria set forth at 2 U.S.C. § 434(f)(3), but does <u>not contain express advocacy or its functional equivalent,</u> is obligated to include, in that communication, a disclaimer notice that meets the requirements of 2 U.S.C. § 441d(d)(2) and to file disclosure reports in accordance with 2 U.S.C. § 434(f)(1). The Court has defined "functional equivalent" as a communication which is not susceptible to any reasonable interpretation other than as an

[1] For future reference in this brief, the term "express advocacy" shall be considered to include the corresponding phrase, "or its functional equivalent" unless otherwise noted.

appeal to vote for or against a specific candidate. *FEC v Wisconsin Right To Life*, 551 U.S. 449; 127 S.Ct. 2652, 2667 (2007).

Respondent submits that a § 434(f)(3) communication which does not contain express advocacy or its functional equivalent is not subject to disclosure/disclaimer regulation by the Commission or the jurisdiction of the FECA.

In order to put Respondent's arguments into perspective, a brief summary of the progression of the electioneering communications (E/C) provisions, and their current status is required. The last decade has seen a great level of fluidity in the area of E/C which is at the core of the issue in this matter. Since its inception as part of the Bipartisan Campaign Reform Act of 2002 (BCRA)[2], the E/C provisions have been the source of numerous court challenges[3] and a seemingly constant revision of the electioneering regulations.[4]

In a facial challenge to the E/C provisions of BCRA, the Supreme Court in *McConnell v Federal Election Commission*, 540 U.S. 93 (2003), upheld the BCRA electioneering communication provisions against various challenges, namely corporate funding restrictions, reporting obligations and disclaimer requirements *Id.* at 194; 201-202; 207-208 respectively. *McConnell* mirrored the standard established in the Court's opinion in *Buckley v Valeo,* 424 U.S. 1 (1976) stating government regulation of political speech requires a strict scrutiny analysis. ("Because BCRA § 203 burdens political speech, it is subject to strict scrutiny. See *McConnell*, 540 U.S., at 205; See also, *Citizens* in which the Court held that the prohibition on corporate independent expenditures and electioneering communications constitutes a regulation of political speech and concluded that § 441b was "subject to strict scrutiny." *Citizens, supra* 898. (See also, *WRTL II* at 459-60; *Austin v Michigan Chamber of Commerce*, 494 U.S. 652, 658 (1990, rev'd on other grounds); *MCFL*, 489 U.S., at 252 (plurality opinion); *Bellotti, supra*, at 786; *Buckley*, 424 U.S., at 44-45.)

The *McConnell* Court ruled that the E/C provisions of BCRA survived the strict scrutiny facial challenges (which included source of funds, disclosure and disclaimer mandates) to the extent the evidentiary record reflects there were advertisement communications in the record which met the express advocacy standards. *Id.* 206. Notwithstanding the Court's ruling upholding the various E/C provisions to the facial challenge, the Court did

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[2] Pub. L. No. 107-155, 116 Stat. 81 (2002).

[3] Including, McConnell v Federal Election Commission, 540 U.S. 93 (2003) (*McConnell*); FEC v Wisconsin Right To Life, Inc., 551 U.S. 449 (2007) (*WRTL II*) ; Citizens United v FEC, 558 U.S. ____, 130 S.Ct. 876 (2010) (*Citizens*); Shays v FEC, 3 F. Supp. 2d 18 (D.D.C 2004), *aff'd*, 414 F.3d 76 (D.C. Cir. 2005), *reh'g en banc denied*, No. 04-535 (D.C. Cir. Oct 21, 2005).

[4] Final Rules and Explanation and Justification on Electioneering Communications 67 FR 65190 (Oct. 23, 2002); Final Rules and Explanation and Justification on Electioneering Communications, 70 FR 75713 (Dec 21, 2005); Rule Making Petition: Exception for Certain "Grassroots Lobbying" Communications from the Definition of "Electioneering Communications" 71 FR 13557 (March 16, 2006); Explanation and Justification for Final Rules on Electioneering Communications, 72 FR 72899 (Dec. 26, 2007) in response to Wisconsin Right To Life; Pending, James Madison Center for Free Speech, Petition for Rulemaking (http://www.fec.gov/law/law_rulemakings.shtml) requesting rulemaking based upon Supreme Court's opinion in *Citizens United*.

acknowledge that its ruling might not apply to attempts to regulate genuine issue ads leaving open the opportunity for an as-applied challenge. *Id.* 206, n. 88.

Since the *McConnell* opinion pertaining to the BCRA E/C provisions ruled against various challenges, namely corporate funding restrictions, reporting obligations and disclaimer requirements (*Id.* at 194; 201-202; 207-208 respectively) based upon the evidentiary record, it stands that the Court's acknowledgement of an opportunity for a subsequent as applied challenge encompassed not only the funding source prohibitions for the E/C, but also applied to the corresponding E/C disclosure and disclaimer provisions.

Therefore, contrary to the FLA Legal Analysis, the *McConnell* holding pertains only to E/C including the corresponding disclosure and disclaimer obligations, for which the E/C contained express advocacy. The Court left open, for an as applied challenge, including disclosure/disclaimer challenges, that situation in which there was a case of genuine issue advertisements which did not constitute express advocacy.

That as-applied challenge to BCRA's E/C provisions was presented in *Wisconsin Right To Life, Inc. v FEC*, 546 U.S. 410 (2006) (WRTL I) wherein the Court held that the *McConnell* ruling, upholding the corporate funding prohibition for E/C, did not preclude an as applied challenge to that prohibition. *Id* 411-12. See also, Final FEC Rules, 72 FR 72899 (Dec. 26, 2007).

After remand, the case once again came before the Court in *WRTL II*. The Court was presented with the issue of whether a not-for-profit entity could constitutionally make use of its treasury funds to pay for a communication which advocated a legislative issue, albeit one that met the E/C statutory provisions at § 434(f)(3). The Court held that the communication was subject to strict scrutiny ("Because BCRA §203 burdens political speech, it is subject to strict scrutiny." *id* 459). To meet the strict scrutiny standard, the E/C could only be subject to the BCRA regulation if the communication constituted express advocacy or its functional equivalent. *Id* 11; see also, *McConnell, supra* 206. The concept of "functional equivalent" was further defined by the Court; "...an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id* 65.

It must be noted the complaint in *WRTL II* did not challenge the disclosure and disclaimer requirements and therefore, the Court did not opine on whether the E/C disclosure/disclaimer provisions were similarly deemed unconstitutional as applied. That as applied challenge to the E/C disclosure/disclaimer has not been ruled upon by the Court and therefore it remains an open question. 72 FR 72899, 72901.

In response to the Court's opinion in *WRTL II*, the FEC issued new E/C regulations (72 FR 72899 (Dec. 26, 2007). In its NPRM, the Commission proposed comments on alternative approaches to meet the requirements of *WRTL II*. The first approach, which employed a narrow interpretation of *WRTL II*, permitted the use of corporation and labor

organization funds to pay for communications which do not meet the express advocacy standard but would never the less require the organization to file FECA disclosure reports and include a disclaimer notice in the communication. *Id, 72900*. The second approach proposed to exempt from the definition of E/C, those issue ad communications which did not meet the express advocacy standard. Effectively that exemption to the E/C definition removed the corresponding FECA disclaimer and reporting obligations for those types of communications.[5] The Commission selected the first alternative based upon the fact,

> "The plaintiff in WRTL II challenged only BCRA's corporate and labor organization funding restrictions in section 441b(b)(2) and did not contest either the separate statutory definition of "electioneering communication" in section 434(f)(3), the separate reporting requirement in section 434(f)(1), or the separate disclaimer requirement in section 441d... Because *WRTL II* did not address the issue, *McConnell* continues to be the controlling constitutional holding regarding the EC reporting and disclaimer requirements." *Id* 72901.

The FEC Regulations at 11 CFR § 114.15(f) (2011), issued in December 2007, addressed the obligations for filing disclosure reports for electioneering communications which do not meet the express advocacy standard. Those regulations permitted the use of corporate/labor funds to pay for the non-express advocacy type E/C communication but required the filing of disclosure reports/disclaimers.

These regulations now are void and unconstitutional as a result of the Court's January 2010 opinion in *Citizens*. Therefore, the E/C provisions and corresponding disclosure and disclaimer provisions of §114.15 were void at the time Boxer Ads were aired. The only controlling authority at the time the Ads were aired was the statutory provisions at § 434(f) and the relevant holdings of the Court.

The constitutionality of, and compliance with the § 434(f)(1) disclosure requirement was properly questioned by any party, including Respondent, in light of the *WRTL II* ruling that E/C communications which do not contain express advocacy all outside the scope of *McConnell*. "Because WRTL's ads may reasonably be interpreted as something other than an appeal to vote for or against a specific candidate, we hold they are not the functional equivalent of express advocacy, and therefore fall outside the scope of *McConnell's* holding." *Id* p.71 (citations omitted). The plain reading of that holding, and one properly relied upon by Respondent, is that for an E/C which does not contain express advocacy, the prohibition on source of funds, disclosure report and disclaimers were not mandated under *McConnell* when a § 434(f)(3) E/C does not contain express advocacy.

The E/C regulatory issue has now come full circle since the Commission is now once again in the process of drafting new E/C regulations based upon the *Citizens* ruling. (See January 26, 2010 Petition for Rule Change, submitted by James Madison Free Speech Center)

[5] 72 FR 72899, at 72900; see also 72 FR 50261 (Aug. 31, 2007)(" NPRM") at 50262-63.

III. The FLA correctly acknowledges corporate treasury funds are a permissible source from which to pay for expenses associated with E/C and that the Ads did not constitute express advocacy.

The FLA dismisses the potential issue of Respondent's use of corporate funds, to pay for the Ads, based upon the Court's opinion in *Citizens*. "In *Citizens United v Federal Election Commission,* the Supreme Court struck down as unconstitutional the Act's prohibition on corporate financing of electioneering communications at 2 U.S.C. § 441b(b)(2),..." FLA p. 3. Therefore, any potential issue as to whether there was an improper expenditure of corporate funds to pay for the Ads is summarily dismissed per the FLA based upon the *Citizens* opinion.

The FLA also concludes that the Ads did, "*...not make any clear reference to, or expressly advocate her (Boxer) defeat in, the upcoming election*". FLA p. 2. As noted above, Respondent concurs with the FLA analysis that the Ads do not constitute express advocacy or its functional equivalent.

Therefore, based upon the Court's strict scrutiny standard, the fact the Ads neither expressly advocate the election of Sen. Boxer nor are the Ads susceptible to any reasonable interpretation that they are an appeal to vote for or against Sen. Boxer, one must conclude the Ads are not subject to FECA regulation. (See *supra* section II above).

IV. For communications which meet the §434(f) indicia but which fail to constitute express advocacy or its functional equivalent, there is no opinion from the Court or any court, which is directly on point.

As noted above, subsequent to the *WRTL II* ruling, the Commission contends that the controlling authority related to disclosure/disclaimer requirements is *McConnell.* ("Because WRTL II did not address the issue, *McConnell* continues to be the controlling constitutional holding regarding the EC reporting and disclaimer requirements." 72 FR 72901). Respondent disagrees because the holding in *McConnell* is factually distinguished and not controlling relative to the issue of disclosure/disclaimer requirements for communications meeting the criteria of § 434(f)(3) but which do not meet the express advocacy standard.

The *McConnell* evidentiary record upon which the Court based its ruling, (*McConnell* 462) as distinguished from the Ads in this case, pertained to communications which met the express advocacy standard and on that basis alone the E/C disclosure/disclaimer requirements were upheld. The Court employed the same rational for upholding the over breath constitutional challenge to the definition of E/C leaving open the as applied challenge.

Since the Court left open the opportunity for an as applied challenge, it thereby acknowledged there are situations in which the E/C regulations, including the E/C disclaimer/disclosure provisions, (which were part of the *McConnell* pleading), could be

found to be communications which did not constitute express advocacy. Such communications, including the collateral disclosure/disclaimer would therefore fail to meet the strict scrutiny standard and thus not be subject to FECA regulation. Therefore, *McConnell* can not be cited as the controlling authority, as proposed by the FLA, in those cases in which the content of the communication meets the § 434(f)(3) criteria but does not meet the express advocacy standard. The issue is one for which there is not controlling authority.

There is also a discrepancy with the prior positions of the Commission and those of the FLA claiming that subsequent to *WRTL II*, *McConnell* is the controlling constitutional authority which requires disclosure and disclaimer for all E/C, even for those issue ad communications which fail to meet the express advocacy standard. 72 FR 72899 at 72901.

The FLA contends *McConnell* is the controlling authority and mandates disclosure and disclaimers for those communications which are issue ads but which also meet the § 434(f)(3) indicia. *Id.* In its 2007 NPRM, *supra* the Commission sought comments on an alternative (specifically Alternative 2) which would have amended the regulatory definition of E/C to exempt § 434(f)(3) type issue ads (those without express advocacy) from the definition of E/C and thereby exempt those types of communications from the E/C disclaimer/disclosure obligations.72 FR 72899, 72900.

If the *McConnell* ruling without question, does indeed require filing of disclosure reports and disclaimers for § 434(f)(3) qualified issue ads (those without express advocacy) then the Commission, through its regulatory process, would have been prohibited from overriding that disclosure/disclaimer mandate which it now attributes to the Court's ruling. If the Commission truly believed that *McConnell* left no open question as to the disclosure/disclaimer requirements for § 434(f)(3) type communications not containing express advocacy, then the adoption of Alternative #2 by the Commission would have been beyond its statutory authority. However, no such concern was voiced in the NPRM or Final Rule. (See Explanation and Justification for Final Rules on Electioneering Communications, 72 FR 72899 (Dec. 26, 2007). The very fact the Commission included Alternative # 2 in its NPRM indicates the Commission did not consider *McConnell* controlling relative to the disclaimer/disclosure issue.

If on the other hand, the Commission was uncertain as to the impact of *McConnell* on the §434(f)(3) issue ads, then there was a legitimate basis upon which to inquire in its NPRM as to whether the E/C definition should be amended in accordance with the proposed Alternative 2 language That would have been a reasonable approach. However, if that was the case, then the Commission must acknowledge, for purposes of this MUR that *McConnell* did not then nor does it now control and mandate the disclosures/disclaimers for the E/C type issue ads. It is an open issue. The Commission can not sit on both sides of the argument.

McConnell specifically recognized the distinction of "issue advocacy" which was described as the "discussion of political policy generally and advocacy of the passage or

defeat of legislation" *McConnell* p. 205 quoting Buckley 424 U.S. at 48 and of "genuine issue ads" that likely lay beyond the ability of Congress to regulate. *Id* 206 n 88. Therefore, the Court was well aware of the distinctions between express advocacy communications and those that were merely issue advocacy. In opinion, with this distinguishing knowledge, addresses only the former situation, not the latter.

For those reasons, *McConnell* can only be viewed as controlling for those E/C which contain express advocacy; which is not the factual situation involving the Ads.

The next case in the E/C progression is *WRTL II*. However, as noted above (See section II, *supra)* in that case the disclosure/disclaimer provisions were not at issue therefore, it can not be controlling in this current matter. It should be noted again however, that the Court confirmed the FEC has no compelling interest regulating speech absent express advocacy. "This Court has never recognized a compelling interest in regulating ads, like WRTL's, that are neither express advocacy nor its functional equivalent." *WRTL II* 127 S. Ct. at 2671 (internal citations omitted)

The next case cited as potentially controlling is *Citizens* in which the Court upheld the disclaimer requirements of 2 U.S.C.§ 441d (d)(2) and the reporting requirements of 2 U.S.C. § 434(f). The Court stated that, "(t)he disclaimers required by [BCRA] § 311 'provide the electorate with information *McConnell*, 540 U.S. at 196 and 'insure that the voters are fully informed about the person or group who is speaking, *Buckley*, 424 U.S. at 76". *Citizens* 130 S. Ct. at 915 (additional citations omitted). This holding by the Court however is also one that must be distinguished from the current matter regarding the Ads. In *Citizens* the disclosure/disclaimer provisions of BCRA were challenged, however, it was not a facial challenge but rather an as applied challenge. "Citizens United argues that the disclaimer requirements in § 311 are unconstitutional as applied to its ads." *Citizens* 52, (emphasis added). In *Citizens* the Court was once again dealing with a factual record in which the Court found the *Hillary* video to constitute express advocacy. Such is not the case in this matter pertaining to the Ads.

The FLA contends that the *Citizens United* opinion also upheld the E/C disclosure and disclaimer provisions; a statement which is correct, only as far as it goes. However, as was noted above, the Court in *Citizens* found that the communications at issue met the express advocacy standards. As was the case with *McConnell*, it was on that finding that the communication met the express advocacy standards, that the Court upheld the provisions of the BCRA disclosure/disclaimer mandates. Therefore, *Citizens* does not address the factual situation presented in this MUR wherein the communications do not meet the express advocacy standards.

Therefore, neither the ruling in *McConnell* nor in *Citizens* is controlling regarding the issue of disclosure of disclaimer requirements for the current matter pertaining to the Ads because neither of those communications constitutes express advocacy or its functional equivalent.

V. Absent a finding that the Ads constitute express advocacy or its functional equivalent, the Commission lacks jurisdiction to proceed against Respondent for the collateral disclosure and disclaimer issues.

In view of the fact that neither *McConnell*, *Citizens* nor any other case for that matter, provides a definitive answer to the question in this MUR, the first alternative analytical step is to determine if, under current case law, the Commission has threshold jurisdiction over the communication, and the collateral regulatory disclosure/disclaimer obligations at issue in this MUR.

Respondent is not a political committee (2 U.S.C. § 431(4)) and as such the Commission does not have inherent jurisdiction over Respondent's activities. Jurisdiction can only be established in this case, if the Commission can demonstrate the Ads come within the ambit and jurisdiction of the FECA. Respondent submits, the Commission is precluded from exercising its jurisdiction in this matter since the Ads do not contain express advocacy and therefore fail to meet the strict scrutiny burden. There are no other avenues but for the Ads, through which the Commission is able to establish its jurisdiction over Respondent.

As fully briefed above, the FLA acknowledges the Ads do not constitute express advocacy. If there were any question regarding that issue, one would have to conclude the Ads on their face do not fulfill the *WRTL II* standard to justify FECA regulation. The Ads are not the functional equivalent of express advocacy because the Ads may reasonably be interpreted as something other than as an appeal to vote for or against a specific candidate. *WRTL II*, 65. The Ads do not reference an election, they do not speak of Sen. Boxer in her capacity as a candidate, nor do they reference Sen. Boxer's opponent. Rather the content of the Ads addresses budget and military funding issues, albeit in a critical tone related to her record (but not her personally) but still a message that is strictly a grassroots legislative message.

As the Court concluded in *WRTL II*, "Because WRTL's ads may reasonably be interpreted as something other than as an appeal to vote for or against a specific candidate we hold they are not the functional equivalent of express advocacy, and therefore fall outside the scope of *McConnell's* holding". WRTL p. 22 (footnote omitted) (emphasis added). The Ads likewise "fall outside the scope of *McConnell*'s holding" since they do not contain express advocacy and as such the FEC, as was the case in *WRTL*, has no jurisdiction to proceed with enforcement against Respondent.

There is a long line of similar cases in which the Court and the Commission have found a lack of jurisdiction and denied the enforcement reach of the Commission. Many of these cases pertained to the issue of whether the entity made disbursements to fund allegedly federal political communications. Whether the question is if the disbursements cause an entity to be deemed to be making electioneering communications or being deemed a political committee, the jurisdictional analysis is the same.

For example, In *FEC v Machinists Non-Partisan League,* 655 F. 2d 380 (D.C. Cir. 1981), the Court faced the question as to whether a "draft committee's" activities were sufficient to require it to register as a federal political committee. The Court of Appeals held, "...the Commission lacks subject matter jurisdiction over the draft group activities"...because the group was neither under the control of a specific candidate, nor directly related to promoting or defeating a clearly identified federal candidate. To hold such a group to be subject to the jurisdiction of the FECA would, in the Courts opinion, create "grave constitutional difficulties." *Machinist* at 384-85. Since the Court found there not to be subject matter jurisdiction over the draft committees, the collateral registration and disclosure report filings were not required to be made by the draft committee.

Since Respondent is a not-for-profit corporation and not a political committee, then only through Respondent's activities (i.e., the Ads) can the Commission claim jurisdiction over Respondent. As was the case in *Machinist,* Respondent is, "neither under the control of a specific candidate, nor directly related to promoting or defeating a clearly identified federal candidate." *id.* The *WRTL II* Court concurs that speech can only be regulated if it is not "susceptible of (any) reasonable interpretation other than as an appeal to vote for or against a specific candidate". *WRTL II,* p 2667.

The only activity to which the Commission can point to establish its jurisdiction over Respondent is the content of the Ads. Those Ads are not "related to promoting or defeating a clearly identified candidate" but are however, "susceptible of reasonable interpretation other than as an appeal to vote for or against a specific candidate." Since the Ads do not contain express advocacy, they can not be regulated by the FEC and therefore the Commission lacks jurisdiction over Respondent in this matter.

VI. <u>Recent Court decisions substantiate and buttress Respondent's position that the Commission lacks jurisdiction in this matter to enforce E/C disclosure and disclaimer provisions of the FECA.</u>

Most recently, the Court of Appeals for the District of Columbia was faced with whether the disbursements by an entity, *Unity08,* were sufficient to come under the regulation of the FECA and require it to register as a political committee. See *Unity08 v FEC,* 596 F.3d 861 (D.C. Cir. 2010). Relying heavily upon their opinion in *Machinist,* and under the limited definition of a political committee in *Buckley* as to whether it could be constitutionally regulated by the FEC, the Court "...concluded that draft groups were outside the scope of the Act." *Unity08* 11. See also *FEC v GOPAC, Inc.* 917 F. Supp. 851 (D.D.C. 1995) (Commission lacked jurisdiction over GOPAC since its major purpose was not federal election activity, and could not therefore enforce registration and disclosure requirements upon GOPAC).

Three Commissioners opined along this very line of jurisdictional reasoning in MUR 5541. "In other words, the Act does not reach those 'engaged purely in issue discussion,' but instead can only reach 'that spending that is unambiguously related to the campaign of a particular federal candidate'—specifically, 'communications that expressly advocate the election or defeat of a clearly identified candidate.'" (MUR 5541 Statement of Reasons, Commissioners Petersen, Hunter and McGahn, (St't of Rea.) p. 16. "Thus by narrowing the scope of speech that may be regulated consistent with the First Amendment, the Court necessarily narrowed the scope of which entities may be regulated under the Act". *Id.* p 19.

Once the FLA acknowledges that the Ads do not constitute express advocacy, then based upon the case law set out above, the Commission has the burden to proffer alternative evidence that it has a separate bases for jurisdiction over Respondent and thereby authorized to enforce compliance with the E/C disclaimer/disclosure provisions of the FECA. No such proffer of alternative evidence is made in the FLA and therefore, Respondent submits the Commission has no such jurisdiction in this matter.

Short of proffering any additional vehicles by which the Commission could assert jurisdiction over Respondent, the Commission lacks the jurisdiction to move forward with any enforcement proceedings against Respondent.

VI. The mandate for disclosure/disclaimer related to a communication constitutes the regulation of speech and in this matter, there is no recognized government interest to justify such regulation.

BCRA included reporting requirements for persons making disbursements for electioneering communications. 2 U.S.C.§ 434(f)(1). The Court has clearly indicated that an electioneering communication can only be regulated if it meets the express advocacy standard. The Court has been historically consistent on the point that the regulation of political speech can only meet the required strict scrutiny mandate if there is a compelling state interest and the regulation is narrowly tailored (See discussion at section II, *infra*).

The Commission apparently is arguing that even though the Ads are not an express advocacy communication, it can mandate that Respondent comply with the disclosure/ disclaimer requirements. Yet the FLA offers no statement of any state interest, let alone a compelling state interest that would justify the jurisdictional reach of the Commission over Respondent to compel filing of disclosure reports, related to a communication over which the Commission lacks jurisdiction. That proposition is one which exceeds the jurisdiction of the Commissions regulatory authority in the area of E/C ("The electioneering communications prohibitions can be constitutionally applied to *WRTL's* ads only if it is narrowly tailored to further a compelling interest."

"This Court has never recognized a compelling interest in regulating ads, like WRTL's, that are neither express advocacy nor its functional equivalent." WRTL II 127 S. Ct. at (23)2671 (internal citations omitted).

The mandate under the FECA to file public disclosure reports is not one to be lightly taken by either party to this action. The failure to include disclaimer information or filing disclosure constitutes a regulation of speech; i.e., the speaker, in this case the Respondent is subject to civil and potential criminal penalties for failure to comply with the corresponding regulations. 2 U.S.C. § 437g (a)(6) and 437g(c).

Indeed, the mandate for inclusion of disclaimers and filing disclosure reports is a regulation of Respondent's speech. The Ads and the corresponding disclaimer/disclosure regulation are interlocking and directly linked; but for the Ads, Respondent would have no disclaimer/disclosure obligations. Due to the penalties noted above, the Commission would have to acknowledge, (and in fact does in this matter) that Respondent had a comparable level of exposure to penalties for violations of the E/C funding restriction provisions (at least prior to *Citizens*) as it does for the § 434(f)(1) failure to include the disclaimer/disclosure reports. If one is threatened with penalties for undertaking political speech, which is the case with undertaking an E/C without filing disclosure reports or disclaimers, then that constitutes the regulation of that speech. If the penalties for disclosure/disclaimer violations are linked to the communication, then so too is the state's burden to show a compelling interest to justify its jurisdiction and imposition of penalties upon Respondent.

The Court in *WRTL II* specifically states that communications which are not express advocacy or its functional equivalent are outside the jurisdictional scope of *McConnell*. "A court applying strict scrutiny must ensure that a compelling interest supports *each application* of a statute restricting speech. See 540 U.S. at 206 n. 88." The one area of the statute restricting the speech is the collateral disclosure/disclaimer E/C provisions. Therefore, the same level of scrutiny attaches to that application of the restriction.

In *Buckley*, the Court explained that it established the express advocacy standard "[t]o insure that the reach of the disclosure requirements was 'not impermissibly broad'" *McConnell* p. 191 quoting *Buckley*, 424 U.S. at 80. *Buckley* applied the express advocacy construction to disclosure provisions to assure that restrictions were "unambiguously campaign related." *Id.* 81. "The relation of the information sought to the purpose of the Act (i.e. to regulate federal elections) may be too remote "and therefore "impermissibly broad" *id* 80. The requested information does not have a substantial connection with the government interest being sought to be advanced. *Buckley*, 81.

The concerns of the *Buckley* Court are radiantly clear in the current MUR. When the Ads do not come within the jurisdiction of the FECA because the content fails to meet the express advocacy standard, then what possible "relation of the information sought to the purpose of the Act" can possibly be justified? Such information is far too remote to justify regulation of Respondent's activities or in this case its failure to act.

Respondent acknowledges the Supreme Court has never backed off its judgment that disclosure requirements effectuate the legitimate government interest of providing the electorate with information about the sources of campaign-related spending, which in

turn allows voters to make informed choices. *See Citizens* 130 S. Ct. at 913-14; *McConnell*, 197.

There certainly has been a rational expressed by the Court for the filing of disclosure reports and inclusion of disclaimer notices. Respondent does not dispute that point. However, those holdings by the Court have pertained to cases in which express advocacy was evidenced.[6] In those cases, the Court's rational has been that the information serves a legitimate state's interest by informing the *electorate* about sources of funds used to support a *candidate's activities*. This matter however, does not deal with an electorate or a candidate's activities. The communication Ads deal with legislative issues and legislative minded constituents. Thus, there is no state interest, of any level, to mandate disclosure to the FEC for non-candidate related communications. An argument that those entities sponsoring legislative messages whose content is beyond the jurisdictional reach of the FECA, are required to file disclosure reports and disclaimers to provide information to an electorate about candidate activities is, as the *Buckley* Court recognized, "too remote" and "impermissibly broad" to justify the jurisdictional regulatory reach of the Commission.

The Commission has not offered any evidence or interest to sustain the burden of meeting a compelling interest, or for that matter, any state interest whatsoever, for justifying the enforcement of the disclaimer/disclosure reports in this matter. Therefore, its attempts at enforcement in this matter must fail due to lack of jurisdiction.

VII. Since the Court issued its opinion in *Citizens*, there have been subsequent opinions which sustained Respondents position and which were not rebutted let alone even raised in the FLA.

In *Real Truth About Obama v FEC* , U.S. District Court, Eastern District of Virginia, June 16, 2011 No. 3:08 CV-483 (RTAO) the court articulated the applicable standard of review for issues which are the focal point of this case. Though the court found in favor of the FEC in RTAO based upon the facts and the express advocacy content of the communication, the standard recognized by the court is applicable to this case.

"Similarly, disclosure requirements are subject to exacting scrutiny, such that the Government must demonstrate that 'relevant correlation' or a 'substantial relation' exist between the government interest and the information required to be disclosed. *Buckley*, 424 U.S. at 64 (citations omitted) *See Reed v Doe*, 130 S. Ct. 2811, 2818 (2010): *Citizens United*, 130 S. Ct. at 914." *RTAO* p.12. "Since RTAO plans to make only independent expenditures, it may receive unlimited contributions. Therefore, exacting scrutiny is the proper standard of review. Hence, with respect to both the RTAO's challenges, the questions before the Court are whether a 'relevant correlation' or a 'substantial relation' exists between the governmental interest underlying the disclosure rules implemented by § 100.22(b) and the FEC policy and the information those rules required disclosed. (Citing to *Buckley*, 424 U.S. at 64 (citations omitted). *id.* 13.

[6] Respondent does not herein contest FECA disclaimer/disclosure filing requirements but for those as applied to the § 434(f)(3) communications that fail to contain express advocacy. Disclosure/disclaimer requirements related to contribution solicitation and independent expenditures are not at issue herein.

The FEC may only regulate First Amendment activities that are "unambiguously related to the campaign of a particular federal candidate" *Buckley* 80. Informing the public as to the source of funds used to pay for express advocacy communications is a government interest which is a relevant correlation and a substantial relation to a particular federal candidate. But no such correlation between the Ads and the mandated disclosure report exist in this MUR because the communication is an issue grassroots lobbying communication, not one related to a particular federal candidate. There is no recognized government interest by the Court in the filing of FEC disclosure reports for purposes of informing the public as to the source of funds used to pay for such grassroots lobbying communications. There is no correlation between the information to be provided and any government interest related to grassroots lobbying activities. The FLA fails to identify any such government interest.

In order to trigger the disclosure obligation, the underlying communication, for which the disclosure is being made, must be subject to the jurisdiction of the FEC. In this case, it is not. "After *Citizens United*, §100.22(b) informs the definition of 'independent expenditure' in 2 U.S.C. §431(17), and in turn informs whether disclosure of an independent expenditure is required under 2 U.S.C. § 434(c)....since it effectuates disclosure requirements §100.22(b) is subject to exacting scrutiny." *Id* 12- 13.

If the communication, upon which the disclosure and disclaimer obligations are based, is not subject to FEC jurisdiction, then the Commission has the obligation to evidence how the disclosure and disclaimer mandate, independent of the underlying communication Ads is "unambiguously related to the campaign of a particular federal candidate". The simple answer is it can not be evidenced and so the Commission's argument fails.

The Court found that both ads in RTAO constituted express advocacy. In that situation, as with *McConnell* and *Citizens*, because the communication constituted express advocacy, "the disclosure requirements § 100.22(b) implements are unduly burdensome as applied to it." RTAO p. 20.

An even more instructive case on-point regarding disclosure obligations is *Davis v FEC* 554 U.S. 724 (2008) in which the Supreme Court struck down the so called "Millionaire Amendment" provisions of the Act which were part of the BCRA legislation. The Court therein ruled that section 319(a) of BCRA (2 U.S.C. §441a-1(a)) was found to be a violation of the First Amendment. The Court then considered the corresponding disclosure provision at section 319(b). In citing to *Buckley* the Court noted,

> "...compelled disclosure, in itself can seriously infringe on privacy of association and belief guaranteed by the First Amendment.' *Buckley*, 424 U.S. at 64. As a result, we have closely scrutinized disclosure requirement, including requirements governing independent expenditures made to further individual's political speech. *Id.* at 75. To survive this scrutiny, significant encroachments 'cannot be justified by a mere showing of some legitimate governmental interest.' *Id* at 68, 71.

"The § 319(b) disclosure requirements were designed to implement the asymmetrical contribution limits provided for in § 319(b), and as discussed above, § 319(a) violates the First Amendment. In light of that holding, the burden imposed by the § 319(b) requirements cannot be justified and it follows that they too are unconstitutional." (Footnote omitted)" RTAO p. 18.

Following the same analysis set forth by the Court in *Davis* and *RTAO*, the E/C statutory provisions of § 434(f)(1) are unconstitutional as applied to the Ads since the Ads do not constitute express advocacy or its functional equivalent. Since the disclosure requirements of § 434(f) " ...were designed to implement the asymmetrical" provisions of the electioneering communications which are unconstitutional as applied to the Ads since they do not constitute express advocacy; therefore the disclosure and disclaimer burdens imposed by § 434(f) requirements, "...cannot be justified, and it follows that they too are unconstitutional", as applied to the Ads.

Conclusion

For the reasons set out above, the Respondent seeks a ruling of no probable cause for a violation of §§ 434(f) and 441d and close the file.

Respectfully submitted,

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